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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 638

ORANNA B. MOOSMAN, ADMINISTRATRIX of the Estate of ELIZABETH C. BUMGARNER POOWEGUP, deceased,

Petitioner,

vs.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a body politic and corporate of the United States of America, and PARLEY PROBST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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No.

ORANNA B. MOOSMAN, ADMINISTRATRIX of the Estate of ELIZABETH C. BUMGARNER POOWEGUP, deceased,
Petitioner,

vs.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a body politic and corporate of the United States of America, and PARLEY PROBST,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on April 20, 1970.

OPINIONS BELOW

The Judgment and Findings of Fact and Conclusions of Law, rendered by the United States District Court for the District of Utah, and the opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, are reproduced in the appendix hereto as Appendix I, II, and III respectively.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 20, 1970. A timely petition for rehearing in banc was denied on June 5, 1970, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Is Public Law 671 so unique and pioneer in nature that it should be interpreted by the United States Supreme Court?

2. Has the Court of Appeals modified the language of Congress by ignoring the clear and unambiguous language of the Act and thus given the Plaintiff a right to the exclusion of others that is in direct conflict with the intent of Congress?

3. Has the Court of Appeals rendered a decision that is "open-end" in nature and thus created additional litigation over the subject property?

4. Has the Court of Appeals abrogated the provisions of Section 677n and usurped the power of the Secretary of Interior by approving the 1959 sale for $35,000.00?

5. Has the Court modified the language of Congress and bestowed a right of first refusal that never existed?

6. Has the Court of Appeals made Public Law 671 unconstitutional by bestowing a special privilege to the Tribe at the expense of the Mixed Bloods?

7. Has the Court of Appeals ignored the findings of the Trial Court, reviewed the record de novo, and made its own findings in order to justify its desire to award the property to the Tribe?

STATUTES AND REGULATIONS

25 U.S.C. 677 See Appendix XI

25 U.S.C. 677a See Appendix XI

25 U.S.C. 677n See Appendix XI

677n. Disposal of tribal assets by individual member.—Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary: In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from [Aug. 27, 1954] the date of enactment of this Act, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period. (Aug. 27, 1954, c. 1009, § 15, 68 Stat. 876.)

25 CFR Sections 243.2 through 243.7 See Appendix XII

STATEMENT OF THE CASE

In August of 1954, Congress passed Public Law 671. It provided (1) for the dividing of the assets of the Ute Indian Tribe between the mixed-blood members and the full-blood members, (2) for termination of federal supervision over the trust and restricted property of the mixed-bloods, and (3) "for a development program for the full-blood members thereof to assist them in preparing for terminatoin of federal supervision over their property." (25 U.S.C. Sections 677 to 677aa). It appears that the main purpose of the act was to free or release the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation from the paternal powers of the Federal Government. However, the act does not provide for the immediate termination of the wardship relationship between the Indian and the United States (25 U.S.C. 677n and 677y) nor does it allow the individual mixed-blood members to receive title of the property free and clear of all federal supervision and or restrictions. (25 U.S.C. 677n). Certain restrictions over the real estate were to continue until August 27, 1964. Also, no sale was to be valid prior to the termination of federal supervision, unless it was submitted to and approved by the Secretary of the Interior.

A plan was adopted for the division of the assets among the members of the mixed-blood group and the full-blood members of the tribe. Pursuant to the plan a portion of the property went to the mixed-blood

group which was in turn sold to Elizabeth C. Bumgarner, a mixed-blood member of the tribe. (Findings of Fact 5, Appendix II, R. Vol. IV, P. 2)

Thereafter, on October 28, 1959, prior to the receipt of the patent and prior to termination of federal supervision over said real property, Elizabeth C. Bumgarner agreed to sell and Parley Probst agreed to purchase said real property for the sum of $35,000.00. (Findings of Fact 6, Appendix II, R. Vol. IV, p. 3). The October 28, 1959, agreement provided that certain funds were to be held in escrow and paid to Elizabeth C. Bumgarner upon "full compliance by her with the offering procedure."

At the time of the execution of said agreement, the rules and regulations governing the disposition of said real estate had not been promulgated by the Secretary of the Interior. (Findings of Fact 10, Appendix II, R. Vol. IV, p. 5; 25 CFR Part 243, Appendix XII.) Thus no one knew what would be required of the mixed-blood owner. The patent from the United States of America was issued to Elizabeth C. Bumgarner nearly a year later on September 20, 1960.

Thereafter and just prior to November 11, 1960, Mrs. Bumgarner was plagued with marital problems (R. Vol. I, p. 120 to 122), "had a child who was sick" (R. Vol. I, p. 73), was drinking heavily and was in need of money. Under these conditions Mrs. Bumgarner asked for the release of the balance of the mortgage money or purchase price.

Parley Probst agreed that the money in escrow could be released to Elizabeth C. Bumgarner, even

though the conditions stated in the first agreement had not been performed (Findings of Fact 12, Appendix II, R. Vol. IV, p. 6), on condition that Mrs. Bumgarner would promise not to make the offering as required by Section 677n until Parley Probst requested the same to be made.

The extracting of this promise from Mrs. Bumgarner was occasioned by the fact that Mr. Probst had become aware that there were other parties who were interested in the property (R. Vol. I, p. 73), who "very likely might bid the value up considerably or buy it" (R. Vol. I, p. 74). According to Mr. Glen Hatch, Attorney, the Agreement not to offer was obtained for the purpose of delaying the offering "until those people who manifested this interest, who had no better rights than we did, would cool down on the thing." (R. Vol. I, p. 75).

Elizabeth C. Bumgarner died on November 27, 1963. At the time of her death, the October 28, 1959, agreement to sell for $35,000.00 had not been submitted to nor approved by the Secretary of Interior. The October 28, 1959, mortgage was still of record, which mortgage provided, among other things, for the repayment of the $35,000.00 in the event of a failure of Elizabeth to perform pursuant to the provisions of the October 28, 1959, agreement.

On March 23, 1964, Parley Probst submitted a creditor's claim (R. Vol III, p. 197), to which he attached a copy of the agreement of October 28, 1959, and the mortgage hereinbefore refered to without disclosing the second agreement which contained the clause

that Elizabeth Bumgarner was not to offer the property until such time as Parley Probst requested that the same be made. (See Findings of Fact 17, Appendix II, R. Vol. IV, p. 9).

The Trial Court held that the second agreement had been concealed from the Administratrix, the Attorney for the Estate, the Probate Court, and the Heirs of Elizabeth Bumgarner and was not discovered by the Administratrix or any of the Heirs of the Estate until 1966 or 1967. (R. Vol. I, p. 124, Findings of Fact 26, Appendix II).

Pursuant to the creditor's claim, which was based on the first agreement of October 28, 1939, an administratrix's deed was executed conveying the property to Parley Probst.

An action was brought by the Ute Indian Tribe, to set aside the administratrix's deed executed by Oranna B. Moosman, Administratrix, to the defendant Parley Probst. The Ute Indian Tribe further sought to obtain transfer of the land to itself for a sum certain. By way of counterclaim, the Administratrix alleged that said deed was void as a matter of law and was also void or voidable because it was procured by fraud or misrepresentation and requested the court to set aside the deed and restore the defendants to the status quo position that existed prior to the sale.

The jurisdiction of the United States District Court was conferred by Act of October 10, 1966, 80 Stat. 880, U.S.C., Title 28, Section 1362. (Conclusion of Law 3, Appendix II)

The case was tried in the United States District Court for the District of Utah before the Honorable A. Sherman Christensen, sitting without a jury, on the 5th and 6th days of September, 1968. On the 7th day of January, 1969, the court entered an order declaring the Administratrix's Deed to be null and void. The court held that th Ute Indian Tribe had no interest in the property and that legal title to the property belonged to the Estate of Elizabeth C. Bumgarner Poowegup, deceased. The court further held that Parley Probst was entitled to the return of his $35,000.00. (See Appendix I).

The judgment rendered by the District Court was reversed by the Court of Appeals on the ground that the Tribe was deprived of its statutory right and that the rules and regulations were to be construed strictly in favor of the Tribe. Accordingly the property was awarded to the respondent Ute Indian Tribe upon payment to Parley Probst of the sum of $35,000.00 plus interest. (See Appendix III).

REASONS FOR GRANTING THE WRIT

I. PUBLIC LAW 671 IS UNIQUE AND PIONEER IN NATURE AND HAS NEVER BEEN INTERPRETED BY THE UNITED STATES SUPREME COURT.

In 1954 the philosophy of the Indian Subcommittee of the Senate Interior Committee, that the reservations were havens of irresponsibility and that the federal government had been too protective of Indian rights,

began to crystalize. This thinking solidified and resulted in what is known as "The Termination Act." The act divided the tribal capital and destroyed the right of the mixed-blood to be a member of the tribe.

Prior to the Act, there was no distinction between what was thereafter known as the mixed-bloods and full-bloods. All were members of the Tribe; most of both groups grew up on the reservation under the influence of the Bureau of Indian Affairs, and, as a general rule, all had become accustomed to the protective provisions of Indian law. Under these conditions, the termination policy was enacted into law and all members of the tribe having 50% or less, Ute Indian ancestry, were arbitrarily determined to be "competent" to manage their own property. In addition to being declared "competent", the law excluded them from membership in the Tribe. The impact of the termination policy on the mixed-bloods (who were not prepared, from a sociological standpoint, to meet this responsibility) caused this people to fall prey to their own folly and the shrewd business practices of the astute businessman of the commercial world. Thus, the meaning of 25 U.S.C. 677n is of vital importance to the mixed-blood.

Because the Termination Act, Public Law 671, is unique and pioneer in nature, neither the authors nor Congress had the advantage of referring to similar acts, experience, or judicial interpretation. Consequently, almost by necessity, the act is plagued with ambiguity. Confusion has existed since its inception which has led the Indians, their legal counsel, and the lower courts into many paths.

The legal effect of 25 U.S.C. 677n on the property rights of the mixed-blood is an important question which has not been, but should be, settled by this Court.

2. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO THE MATTERS HEREINAFTER SET FORTH, THAT THERE IS A REAL AND SUBSTANTIAL NEED FOR SUPERVISION.

(a) THE COURT HAD NO RIGHT TO LOOK FOR AND IMPOSE A MEANING DIFFERENT FROM THAT EXPRESSLY STATED BY CONGRESS.

Section 15 of PL 671 (25 U.S.C. 677n) provides that "in the event a member of a mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary."

The code is clear and unambiguous. The right to purchase runs to the individual members of the tribe and not to a "body politic and corporate." The dictionary defines the word "member" as follows: (a) one of the individuals composing a group, (b) a constituent part of a whole.

Where the terms of a writing are plain and unambiguous, there is no room for construction, since the only office of judicial construction is to remove doubt and uncertainty. Nothing should be read into the statute which is not gathered from its face and it should not be construed more broadly than its terms require. If Congress intended the interpretation which is suggested by Court of Appeals, it could easily have found the apt word or phrases to express it — this is especially true where it was acquainted with and had used the word "tribe" throughout the Act. All rules for interpretation of statutes have for their sole object the discovery of the legislative intent expressed in the statute when and only when the word has a doubtful meaning; where the language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction. See e.g., Corona Coal Company v. United States, 263 U.S. 537, 540; Thompson v. United States, 246 U.S. 547, 551; and Matson Navigation Company v. United States, 284 U.S. 352, 356. The Court of Appeals had no right to look for or impose another meaning where the statute was plain and unambiguous.

It should also be borne in mind that one of the purposes of the Act of August 27, 1954, was "for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property." See Sec. 1 PL 671 (25 U.S.C. 677). This was in part accomplished by giving the members, as opposed to the tribe as a body politic, the right to purchase said property.

The plaintiff not being a "*member* of the tribe" had no right to purchase.

It was clearly within the power of Congress and no one else to provide who had the right to purchase the property. Tiger v. Western Investment Company, 221 U.S. 286. The Court of Appeals did not have the right to modify the Act and ignore the definitions contained within 25 CFR 243.2 and 25 U.S.C. 677a. By reviewing these sections we find that "Tribe", as such, is not embraced within the definition of "members of the tribe", nor was that omission merely inadvertent for the term "Tribe" was separately defined. Not only did the Court of Appeals modify the language of Congress so that it included the Tribe, a body politic, *but did it to the exclusion of those to whom Congress specifically gave the bidding privilege.*

"To what extent, if any, can the Courts modify the statutory language? Are the words "members of the tribe" to be ignored in favor of effectuating what some believe to be the desirable policy of bestowing a special privilege to the "Tribe"?

(b) THE OPINION FAILS TO PUT AN END TO LITIGATION OVER THE SUBJECT PROPERTY.

If the holding of the Court is correct (1) that the right to purchase is absolute and (2) that there is no statute of limitations to prevent the exercising of the right of first refusal, then each individual member of the tribe has the right to bring an action at anytime, within reason, to enforce his right to purchase, for Congress gave him that right. If this is not the case, the

Tribe has failed to protect the rights of the individual members. It has done as a political body what Congress intended and specifically specified that the members could do as individuals—thus, robbing its members of a vested right.

The Court correctly observed that "construction of an act by the agency charged with its administration should be followed, unless there are compelling indications that it is wrong." Construction of the Act by the Agency allowed individual full-blood members, as well as the mixed-bloods, to bid on and purchase if there was a determination to sell. However, the decision of the Court of Appeals turns the property over to the "Tribe". What is to prevent new lawsuits from being filed now that the Circuit Court has allowed an open-end and seemingly perpetual right to purchase at a given price the Strawberry land?

On July 6, 1970, after the Court of Appeals held that the right to purchase was absolute and that there was no statute of limitations, the Estate of Elizabeth C. Bumgarner Poowegup received "notice of acceptance of offer" from the Affiliated Ute Citizens of the State of Utah indicating a willingness to pay for said property the price offered by Parley Probst to Elizabeth C. Bumgarner and requesting the right to purchase pursuant to the provisions of Public Law 671 and CFR Sections 243.1 to 243.12. See Appendix X. A tender in accordance with the rules and regulations was also made. The Ute Indian Tribe has made no such tender. Who gets the land? This merely points out the many undesirable aftereffects that would stem from the Circuit Court's decision if it were allowed to stand.

The decision of the Tenth Circuit Court is contrary to the basic purpose of our courts to foreclose excessively stale claims and is contrary to controlling decisions in the Federal Court system.

Obviously, the time has come for this Court (1) to interpret the Act, (2) to establish the rights of the mixed-blood Indians as well as the rights of individual full-blood members under Section 677n, and (3) to make a *final decision* as to who has the *ultimate* right to possession and ownership to the subject property.

(c) THE CIRCUIT COURT VIOLATED SECTION 677n OF 25 U.S.C. AND USURPED THE POWER OF THE SECRETARY OF INTERIOR BY APPROVING THE 1959 SALE FOR $35,000.

The Court of Appeals states that "Before the termination of federal supervision, a mixed-blood could dispose of his interest in acquired tribal property only with the approval of the Secretary. See U.S.C. sec 677n and 25 CFR sec 243.3 (1968 ed.)." Yet after making this statement, the Court proceeds to fashion a decision that is based on a sale that took place prior to the termination of federal supervision and which had not even been considered by the Secretary. The language is clear and unambiguous. Any sale to be valid,[1] and bind the mixed-blood or his heirs, if it took place prior to the termination of Federal Supervision, had to

1 25 CFR sec 243.3 provides:

"... **Any contract for the sale of such property to be valid must be approved by the Secretary of the Interior or his authorized representative.** The requirement of Secretary approval shall no longer be applicable after termination of Federal supervision, as herein defined."

be approved by the Secretary of the Interior. Tiger v. Western Investment Co., supra. The 1959 sale for $35,000 *did* occur prior to the termination of Federal Supervision and it was never "approved", except by the Court of Appeals.

It seems to us that there is no evidence in the entire record, not one iota, to show that Elizabeth Bumgarner ever made any sale; or intended or desired to make any sale, except as evidenced by the 1959 agreement. The 1960 agreement was not a sale nor an agreement to sell, but was only an agreement to accelerate the payment of certain escrowed funds.[2]

Only one sale occurred during the ten year period, and that was in 1959, Congress required that such a sale, *one that occurred prior to termination of Federal Supervision*, must be approved by the Secretary.

The essence of the Circuit Court's decision is to place the Secretary's approval on the 1959 sale, thus exercising the discretionary and protective role vested in the Secretary of Interior by Congress. The court, having approved the sale which took place prior to termination of Federal Supervision, then decided it was necessary to "offer it to the members of the tribe. . ." (in reality the Court didn't even offer it to the members, but turned it over to the Tribe itself). Did the Circuit Court have the right to perform this administrative act?

It was within the power of Congress, and no one else, to provide who could approve such a sale. This usurpation justifies the grant of certiorari.

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2 See Findings of Fact 13 and 14 R. Vol. IV, pp 7 and 8 for circumstances that existed at the time the second agreement, which was not a sale, was executed.

(d) CONGRESS NEVER CREATED A "RIGHT OF FIRST REFUSAL" AND MADE NO MENTION OF SUCH A RIGHT, HOWEVER THE COURT OF APPEALS BY MODIFYING THE LANGUAGE ESTABLISHED ONE.

Nowhere in the Act did Congress speak of a "right of first refusal", but only mentioned that, before a mixed-blood could sell, it was necessary for him (1) if the land was sold prior to termination of Federal Supervision, to "offer it to the members of the tribe" *after* the Secretary had approved the sale, and (2) if sold after "termination", to offer it to the members of the tribe in such "*form*" as approved by the Secretary. It should be noted that no right of first refusal is mentioned by Congress and that Section 677n provides specifically that part of the "covenant" that was to run with the land was the "form" of the offering. Congress was specific. The language is clear. The Act creates no "right of first refusal."

The Secretary of Interior had no authority to create a right of first refusal, but did have the right to establish the "form" for offering the property to the "members of the tribe", and that "form" was by Congress attached to the property and it, the "form", became a "covenant" that was to run with the land.

Technically, it would be impossible for a "right of first refusal," or right of pre-emption, to exist if the property was to be offered to the "members of the tribe," for a right of first refusal can only inure to the benefit of one identity, (one person or one corporation,

etc.[3], and, if the offer is to t[illegible] or more, neither has a first right of refusal.

Even the Secretary did not anticipate such a right as created by the Court of Appeals, for in the rules he spells out the language that would be placed in all patents and said language is in conflict with the notion of a right of first refusal or right of pre-emption. The rules existed and were used on numerous occasions by the Tribe and they never objected to language of the rules and the language of the patent that specified that the mixed-bloods could also bid, etc.

The language used by Congress, the rules when read in their entirety, the practice over a ten year period, the language in the patent, the constitutional issue raised in Point 3, all seem to us to refute the idea that the Tribe, or even the Tribe and the members of the tribe to the exclusion of the mixed-bloods, had a right of first refusal.

As mentioned, from both a legal and mathematical standpoint, only one person can be vested with a right of "first" refusal. Congress said it was to be offered to *members* of the tribe. It thus appears that Congress, by implication, intended for competitive type bidding, which would inure to the benefit of all concerned and keep the Act constitutional.

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3 25 CFR sec 243.4 provides that the following language is to be used in each instrument of conveyance: "Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members of the full-blood and **mixed-blood** groups of the Ute Indian Tribe of the Uintah and Ouray Reservation in accordance with regulations now or hereafter prescribed by the Secretary of the Interior, pursuant to the Act of August 27, 1954. . . ." This language appeared in the patent, which conveyed the land to mixed-blood, Elizabeth Bumgarner.

To what extent should the desire to award the property to the Tribe affect the interpretation and application of the language of Congress? Can the Court of Appeals modify the language and create a right of preemption?

3. THE CONGRESSIONAL INTENT AS FOUND BY THE COURT OF APPEALS DEPRIVES THE MIXED-BLOODS OF PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW AND BESTOWS A SPECIAL PRIVILEGE TO THE TRIBE.

The law requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. Equality of benefit is required no less than equality of burden. It is contrary to the principles of liberty and natural justice, and to the spirit of our constitution and laws, that the full-bloods should enjoy privileges and advantages which are denied to, and at the expense of, the mixed-bloods.

Substantive due process requires that laws will operate equally, and afford freedom from arbitrary action. The decision of the Circuit Court places an interpretation upon the act which makes it unconstitutional, because it discriminates against the mixed-bloods—it is arbitrary in that it gives a right to purchase without consideration.

Due process of laws is denied when any particular class is singled out for the imposition of restraints or burdens on their property which restraints or burdens inure directly to the benefit of another class. Discrim-

ination is invalid if it is purely arbitrary and made to depend on difference of *nativity*. Congress cannot take what might be termed "a natural class of persons," a condition that existed prior to Public Law 671, split that class in two, and then arbitrarily designate the disserved factions of the original unit as two classses and thereupon enact different burdens and privileges for each. "Distinctons between citizens solely because of their ancestry are by their very nature odious. . . ." *Hirabayashi v. United States*, 320 U.S. 81, 100. There must be present a just and natural reason for the difference made in their liabilities and burdens and in their rights and privileges. Prior to Public Law 671, all members of the Tribe were treated equal and had equal right with respect to their individual interest in the tribal assets. Public Law 671 divided them into two classes according to nativity or race. Having split what might be termed as a natural class of persons in two, the law, under the Circuit Court's interpretation of Congressional intent, then arbitrarily bestowed a first right of refusal in favor of the full-blood to the exclusion of the mixed-blood—granting a privilege to the full-bloods, and placing a burden on the property of the mixed-bloods, without any consideration being exchanged. *Levy v. Louisiana*, 391 U.S. 68, 20 L Ed 2d 436.

A right of first refusal, to the exclusion of others, under such circumstances, is of immeasurable value. Did Congress intend to give these windfalls to the Tribe, without any consideration running to the mixed-bloods who were now cast adrift? We think not. The intent of Congress must be interpreted in the manner decided by the Trial Court, otherwise the Act is unconstitutional.

The intent determined by the Trial Court not only is fair to all concerned, but prevents the Act from conferring special privileges on one class *at the expense of another.*

FINALLY, the correctness of the decision of the Court of Appeals, irrespective of the above, is open to serious question. The Trial Court exonerated the deceased, Elizabeth C. Bumgarner, from any intent to violate the law or defraud the members of the tribe and yet the Court of Appeals in denying the petition for rehearing refused to respect those findings and stated: "Oranna says that the action of the Court usurps the power of the Secretary to approve the sale and that, because the Secretary never approved the sale, the deed of Probst is ineffective . . . the facts are that no one asked for the approval of the Secretary and that the *machinations* of Probst, Elizabeth, and *Oranna* delayed the execution of the deed until the ten year period." See page 3 of the Per Curiam Decision. The Court casts aspersions to justify its position. There was no evidence nor even allegations that there were any machinations between Oranna and Probst. (Oranna being the nineteen year old mixed-blood daughter who was the Administratrix of her mother's estate) and the Trial Court exonerated her mother, Elizabeth. The action of the Court in reviewing the record de novo and in making its own findings as to "machinations" in order to justify its right to modify the language and requirements of Congress cannot be justified.

In effect, it is the mosaic nature of the errors and action of the Court of Appeals coupled with the uniqueness of the statute that creates the need for this Court to exercise its power of supervision.

CONCLUSION

For these reasons, and because there is some question as to whether this land was even subject to Sec. 677n (see Point I, page 17, of the Petition For A Writ Of Certiorari Of Parley Probst), a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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August 28, 1970